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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 PAUL E. HERNDON, ) NO. SA CV 17-142-GW(E)  
12 )  
13 Plaintiff, )  
14 )  
15 v. ) MEMORANDUM OPINION  
16 )  
17 NANCY A. BERRYHILL, Acting ) AND ORDER OF REMAND  
18 Commissioner of Social Security, )  
19 )  
20 Defendant. )  
21 )  
22 )  
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18 Pursuant to sentence six of 42 U.S.C. section 405(g), IT IS  
19 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
20 judgment are denied and this matter is remanded for further  
21 administrative proceedings consistent with this Opinion.  
22

23 BACKGROUND  
24

25 Plaintiff asserts disability based on, among other alleged  
26 impairments, post-traumatic stress disorder ("PTSD") (Administrative  
27 Record ("A.R.") 66-68, 75-76, 87, 177). On July 8, 2015, an  
28 Administrative Law Judge ("ALJ") decided that Plaintiff suffers from

1 severe PTSD and other severe impairments but retains the residual  
2 functional capacity to perform certain jobs requiring no more than  
3 occasional interaction with coworkers, supervisors and the general  
4 public (A.R. 25, 28). In making this decision, the ALJ gave "partial  
5 weight" to a January 10, 2014 decision of the Department of Veteran  
6 Affairs ("VA") (A.R. 32). This VA decision had stated that  
7 Plaintiff's PTSD was only partially (70%) disabling (A.R. 962). The  
8 ALJ quoted the portions of this VA decision which had stated that  
9 Plaintiff's PTSD resulted in only an "occasional decrease in work  
10 efficiency" and permitted Plaintiff "generally [to] function[]  
11 satisfactorily" (A.R. 32, 962).

12  
13 On December 31, 2015, Plaintiff received a new VA decision  
14 ("Plaintiff's Points and Authorities, etc.," filed July 13 2017, at p.  
15 9). This new VA decision determined that, "effective May 13, 2015,"  
16 Plaintiff's PTSD was 100% disabling (Document 18-2 of "Exhibits  
17 Ordered by the Court," filed September 19, 2017) (the "new VA  
18 decision"). Plaintiff submitted to the Appeals Council the new VA  
19 decision, together with other new evidence. The Appeals Council  
20 purportedly "looked at" this evidence, but denied review and declined  
21 to make the evidence a part of the administrative record (A.R. 2, 6-  
22 7).<sup>1</sup> The Appeals Council stated that the ALJ had "decided your case  
23 through July 8, 2015" and "[t]his new information is about a later  
24 time" (A.R. 2). The Appeals Council did not acknowledge that the  
25 effective date of the new VA decision actually preceded the date of

26  
27 <sup>1</sup> Of all the documents newly submitted by Plaintiff, the  
28 Appeals Council chose to make a part of the administrative record  
only a five page letter from Plaintiff's counsel (A.R. 2, 6-7,  
303-07).

1 the ALJ's decision (id.) The Appeals Council's denial of review left  
2 the ALJ's decision as "the final decision of the Commissioner of  
3 Social Security. . . ." (A.R. 1).

4  
5 **PROCEEDINGS**  
6

7 Plaintiff, pro se, filed a Complaint in this Court on January 26,  
8 2017, seeking review of the Social Security Administration's denial of  
9 disability benefits. Plaintiff filed a motion for summary judgment on  
10 July 13, 2017. Defendant filed a motion for summary judgment on  
11 August 14, 2017.

12  
13 On August 29, 2017, the Magistrate Judge filed the following  
14 Minute Order:  
15

16 In "Plaintiff's Points and Authorities in Support of  
17 Plaintiff's Motion for Summary Judgment," filed July 13,  
18 2017, Plaintiff contends, among other things, that the Court  
19 should remand the case to the Social Security Administration  
20 for consideration of assertedly "new and material evidence."  
21 In "Defendant's Cross Motion for Summary Judgment," filed  
22 August 14, 2017, Defendant appears to contend that the  
23 assertedly "new and material evidence" is not material.  
24

25 Neither party has yet submitted to this Court the  
26 assertedly "new and material evidence." Therefore, it is  
27 ordered that, within twenty-one (21) days of the date of  
28 this Order, the parties (jointly or separately) shall file

1 the evidence Plaintiff contends to be "new and material."

2 Within fourteen (14) days after this filing, the parties may  
3 file supplemental memoranda in support of or in opposition  
4 to the pending motions for summary judgment. At that time,  
5 the Court will take the motions under submission without  
6 oral argument, unless the Court otherwise orders.

7  
8 On September 19, 2017, Defendant filed "Exhibits Ordered by the  
9 Court" ("the new evidence") consisting of the evidence Plaintiff  
10 previously submitted for the first time to the Appeals Council.<sup>2</sup> Also  
11 on September 19, 2017, Plaintiff filed "Plaintiff's Response to the  
12 Court's August 29, 2017 Order, etc." This response appends the new VA  
13 decision.

14  
15 Defendant filed "Defendant's Supplemental Memorandum, etc." on  
16 October 2, 2017. Plaintiff filed "Plaintiff's Supplemental  
17 Memorandum, etc." on October 3, 2017.

## 18 DISCUSSION

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21 <sup>2</sup> On the face page of this document, Defendant appears to  
22 assert that the Appeals Council "considered" this evidence. New  
23 evidence truly "considered" by the Appeals Council becomes a part  
24 of the administrative record. See Brewes v. Commissioner, 682  
25 F.3d 1157, 1162-63 (9th Cir. 2012) ("Brewes"). In the present  
26 case, the Appeals Council said it "looked at" the new evidence  
27 but declined to make this evidence a part of the administrative  
28 record. The Appeals Council appears to have "considered" only  
that which was "listed on the enclosed Order of Appeals Council  
. . ." i.e. the five page letter from Plaintiff's counsel (A.R.  
2, 6-7). See Neuhauser v. Colvin, 2015 WL 5081132, at \*3 (W.D.  
Wash. Aug. 27, 2015) ("In contrast to Brewes, the Appeals Council  
in this case did not accept Neuhauser's proffered new evidence  
and make it part of the administrative record. . . . The Appeals  
Council determined that the VA Rating Decision was about a later  
time and thus did not affect the ALJ's decision.").

1       The Court may remand a case to the Social Security Administration  
2       "upon a showing that there is new evidence which is material and that  
3       there is good cause for the failure to incorporate such evidence into  
4       the record in a prior proceeding." 42 U.S.C. § 405(g); see Shalala v.  
5       Schaefer, 509 U.S. 292, 297 n.2 (1993). Such a remand proceeds from  
6       the sixth sentence of section 405(g) and is commonly referred to as a  
7       "sentence six remand." See id.

8  
9       The "good cause" requirement for a sentence six remand generally  
10      is satisfied when the new evidence "did not exist at the time of the  
11      ALJ's decision." Burton v. Heckler, 724 F.2d 1415, 1418 (9th Cir.  
12      1984). "The good cause requirement often is liberally applied, where  
13      . . . there is no indication that a remand for consideration of new  
14      evidence will result in prejudice to the [Commissioner]." Embrey v.  
15      Bowen, 849 F.2d 418, 423 (9th Cir. 1988) (citations and quotations  
16      omitted).

17  
18      New evidence is "material" within the meaning of sentence six  
19      when the evidence "bears directly and substantially on the matter in  
20      dispute," and "there is a reasonable possibility that the new evidence  
21      would have changed the outcome of the [administrative] determination."  
22      Bruton v. Massanari, 268 F.3d 824, 827 (9th Cir. 2001) (citations and  
23      quotations omitted); see Booz v. Secretary, 734 F.2d 1378, 1380-81  
24      (9th Cir. 1984).

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27      In the present case, Plaintiff lacked access to the new evidence,  
28      including the new VA decision, until after the ALJ's decision.

1 Accordingly, Plaintiff has established "good cause" for his failure to  
2 present the new evidence to the ALJ. See Burton v. Heckler, 724 F.2d  
3 at 1418; cf. Pace v. Astrue, 2010 WL 3291753, at \*2 (D. Or. June 28,  
4 2010), adopted, 2010 WL 3306891 (D. Or. Aug. 19, 2010) (finding "good  
5 cause" for the claimant's failure to submit to the Administration a VA  
6 decision received by the claimant after the conclusion of the  
7 administrative proceedings).

8  
9 The nature of the new VA decision in relation to the nature of  
10 the ALJ's decision also satisfies the "materiality" requirement for a  
11 sentence six remand. Contrary to the Appeals Council's apparent  
12 belief, the new VA decision relates to part of the same time frame  
13 addressed by the ALJ's decision. Furthermore, the ALJ's decision  
14 relied in part on the old VA decision's findings that Plaintiff was  
15 "generally functioning satisfactorily" and had suffered only an  
16 "occasional decrease in work efficiency." By contrast, the new VA  
17 decision rates Plaintiff's PTSD disability at 100% based on: "Total  
18 occupational and social impairment . . ." (Document 18-2 of "Exhibits  
19 Ordered by the Court, filed September 19, 2017). Moreover, an ALJ  
20 ordinarily must give "great weight" to a VA rating of disability. See  
21 McCartey v. Massanari, 298 F.3d 1072, 1076 (2002); accord Valentine v.  
22 Commissioner, 574 F.3d 685, 695 (9th Cir. 2009). Thus, there is at  
23 least a "reasonable possibility" that the new evidence would have  
24 changed the outcome of the ALJ's determination had the evidence been  
25 before the ALJ. See Neuhauser v. Colvin, 2015 WL 5081132, at \*3 ("the  
26 VA Rating Decision pertained to the relevant time period and was  
27 therefore material to the disability decision"; case remanded under  
28 sentence six); Pace v. Astrue, 2010 WL 3291753, at \*2 (VA decision

1 covering part of the relevant time period deemed material; case  
2 remanded under sentence six); see also Auer v. Astrue, 2012 WL  
3 1340133, at \*7 (C.D. Cal. April 18, 2012) (new VA decision deemed  
4 "plainly material"; case remanded under sentence six); cf. Gardner v.  
5 Berryhill, 856 F.3d 652, 658 (9th Cir. 2017) (stating in the context  
6 of sentence four issues, "we have affirmed district court denials of  
7 remand notwithstanding the existence of new evidence only when there  
8 would be substantial evidence supporting the denial of disability  
9 benefits even if the new evidence were credited and interpreted as  
10 argued by the claimant").

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1 **CONCLUSION**

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3 For the foregoing reasons, this matter is remanded for further

4 administrative proceedings so that the ALJ can consider the new

5 evidence.<sup>3</sup>

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7 DATED: November 22, 2017.

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10 GEORGE H. WU  
UNITED STATES DISTRICT JUDGE

11

12 PRESENTED this 5th day of

13 October, 2017, by:

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15 /s/  
CHARLES F. EICK  
UNITED STATES MAGISTRATE JUDGE

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28 <sup>3</sup> The Court need not and does not reach any of the other  
issues discussed in the parties' motions. Except as expressly  
stated herein, both motions are denied without prejudice.